MULTI-PURPOSE HOLDINGS BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM JC
[CIVIL APPEAL NO: R3-14-1-1997]
9 AUGUST 1997

REVENUE LAW: *Share transfer - Share Transfer Tax Act 1984, whether applicable - Whether date of transfer was date of agreement - Whether approval from Foreign Investment Committee deemed approval from authority appointed by government*

The appellant entered into an agreement with the purchasers to transfer its shares to the latter, subject to approval by the government and the regulatory authorities. Approval of the Foreign Investment Committee ('FIC') was obtained on 3 October 1984 and approval from Bank Negara was obtained on 8 November 1984. The Special Commissioner of Income Tax made an order that the Share Transfer Tax Act 1984 ('STTA') as amended and brought into force on 19 October 1984 was applicable to the appellant's sale of its shares on 8 November 1984, the date on which Bank Negara's approval was obtained. The appellant appealed against this order and submitted that the STTA did not apply since the disposal of the shares was effected under the agreement on 6 July 1984.

Held:

[1] The agreement which was executed on 6 July 1984 was a contingent agreement until government approval was obtained. The agreement could not be said to be a completed and enforceable transaction.

[2] Bank Negara was the sole and only authority to grant approval for the disposal of the shares. Its approval must first be obtained before the disposal of the shares could be effected.

[3] The FIC's letter dated 3 October 1984 was not an approval and the FIC was not the authority referred to in s. 5 of the STTA.

[4] As the date of the approval of the shares was obtained after 19 October 1984, the effective date of the STTA, the decision in the case stated was right in law.

[Appeal dismissed with costs.]

Cases referred to:
Duncan v. Dixon [1890] 44 Ch D 211 ***(cit)***
National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76 ***(foll)***
Kwong Borneo Development Co Sdn Bhd v. DGIR (unreported) ***(cit)***

Legislation referred to:
Contracts Act 1950, s. 33(a)
Finance (No 2) Act 1985
Income Tax Act 1967, para 34, sch 5
Interpretation Acts 1948 & 1967, s. 19(1)
Share (Land Based Company) Transfer Tax Act 1984, ss. 3, 5(a), (b)

Other source referred to:
Craines on Statute Law, SGG Edgar, 7th edn, p 218

For the applicant - Anand Raj; M/s Shearn Delamore & Co
For the respondent - Salmah Kasim; Legal Officer (Lembaga Hasil Dalam Negeri)

JUDGMENT

Nik Hashim JC:

This is an appeal by Multi-Purpose Holdings Bhd. (the appellant) by way of a case stated against the deciding orders of the Special Commissioners of the Income Tax pursuant to para. 34 of Sch. 5 to the Income Tax Act 1967 (the Act). The Special Commissioners decided that the Share (Land Based company) Transfer Tax Act 1984 (the STTA), as amended by the Finance (No. 2) Act 1985 (Act 323), and brought into force on 19 October 1984, applied to the appellant's disposal of shares which was deemed to have taken place on 8 November 1984, the date when the government approval was obtained, and as such, they dismissed the appeal and directed that the assessment of RM15,147,847.10 as share transfer tax be confirmed.

The facts are not in dispute. The appellant is a company incorporated on 18 August 1975. The appellant was the registered and beneficial owner of 6,500,000 shares in Dominion Holdings Sdn. Bhd. (the 'DH'), and 6,500,000 shares in Goodrich General Industries Sdn. Bhd. (the 'GG') (hereinafter collectively referred to as 'the shares'). Both DH and GG were wholly-owned subsidiaries of the appellant and they collectively owned 24,405,994 ordinary shares in United Malayan Banking Corporation Berhad (the 'UMBC'). By an agreement dated 6 July 1984 (the 'agreement') entered into between the appellant and Daan Sdn. Bhd. and Dani Sdn. Bhd. (the 'purchasers'), the appellant agreed, *inter alia*, to transfer the shares to the purchasers for a consideration as set out in the agreement. The agreement however, was

conditional upon approval by the government and regulatory authorities as set out in cl. 3 therein. Pursuant to the aforesaid conditions the appellant applied for and obtained what the appellant called the approval of the Foreign Investment Committee (FIC) on 3 October 1984. The appellant also obtained the approval of the Bank Negara Malaysia on 8 November 1984 for the sale of the shares.

The issue before the High Court is whether the provisions of the STTA as amended by the Act 323 which came into force on 19 October 1984 apply to the appellant's disposal of the shares pursuant to the agreement dated 6 July 1984, at which time the STTA had not yet been enacted.

It is the contention of counsel for the appellant that the STTA does not have any application to the appellant's disposal of the shares as the disposal was already a completed transaction on 6 July 1984 under the agreement; and any attempt to determine the disposal date by reason of the agreement would be contrary to law by reason of giving retrospective effect when no express statutory provision has been made in regard to completed transaction ie, disposal. The counsel further submitted that the proviso to s. 5 does not apply to the present case. He argued that the proviso should not be interpreted so as to enlarge the disposal prior to 19 October 1984 as the disposal was already effected by virtue of the agreement dated 6 July 1984 which is prior to the coming into force of the STTA on 19 October 1984. *Craines on Statute Law* 7th Edn, p. 218 by S.G.G. Edgar and *Duncan v. Dixon* [1890] 44 Ch. D 211 were cited in support.

The respondent's counsel, on the other hand, argued that the STTA as amended by the Act 323 is applicable to the appellant's case.

The relevant provisions of STTA for the purpose of this appeal are ss. 3 and 5 which are as follows:

> 3. A tax, to be called share transfer tax, shall be charged in accordance with this Act on the value of every disposal of shares in a land based company on or after the 19 October 1984 under circumstances specified in s. 4.
>
> 5. A disposal of a chargeable asset shall be deemed to take place:
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> (a) where there is an agreement in writing or otherwise for the disposal of the chargeable asset, on the date of such agreement; or
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> (b) where there is no agreement, on the date of delivery of the chargeable asset to the acquirer:

> Provided that where in either case the disposal or acquisition of such chargeable asset requires the approval by the government or an authority or committee appointed by the government, the date of disposal shall be the date of such approval or, **where such approval is conditional, the date when the condition or last of the conditions is satisfied.**

The bold words were inserted by the Act 323 which also came into force with effect from 19 October 1984.

It is clear that the agreement which the appellant executed on 6 July 1984 is a contingent agreement by virtue of s. 33(a) of the Contracts Act 1950. The parties by cl. 3 of the agreement have entered into a contract for the sale of the shares conditional upon the approval of the transaction by the government over which the parties had no control. Until the government approval was given the agreement could not be said to be a completed and enforceable transaction (*National Land Finance Co-operative Society Ltd. v. Sharidal Sdn. Bhd.* [1983] 2 MLJ 211; [1983] 2 CLJ 76). Thus, as at 6 July 1984 the agreement for the disposal of the shares was not yet a completed transaction as the agreement is subject to the approval by the government. That being so, the proviso was correctly applied to the appellant's agreement. In other words, the agreement is 'caught' by the proviso. The proviso is part of s. 5, and therefore, it must be read together with the rest of the section including s. 5(a). There is no ambiguity in the provisions of s. 5 whatsoever. The amendment to s. 5 made by Act 323 with retrospective effect to 19 October 1984 is not contrary to law as the effective date is expressly provided for under the amending Act 323 (see s. 19(1) Interpretation Acts 1948 & 1967). Indeed, the amendment clears the doubt that when a conditional approval is given the date of disposal shall be the date on which the condition or last of the conditions is fulfilled. The date of approval by the government constitutes the date of disposal. Hence, the date of the agreement *per se* does not determine the applicability of the STTA (see *Kwong Borneo Development Co. Sdn. Bhd. v. DGIR* (Unreported) High Court Kota Kinabalu, Tax Appeal No. 01 of 1989).

Accordingly, when was the government approval obtained in this case? Counsel for the appellant contends that the FIC's letter dated 3 October 1984 is the approval and the only authority that is referred to in s. 5. According to counsel, Bank Negara approval is not a requirement under the section. In this regard, it is significant to note para. 4 of the FIC's letter which reads:

> This is to inform you that the FIC has no objection to the acquisition by Daan and Dani of 40.7% interest in UMBC held by Goodrich and Dominion and the acquisition by MPHB of 51% interest in MFB held by Aslira subject to the approval of Bank Negara Malaysia being obtained.
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> (Emphasis added).

In my judgment, the FIC's letter dated 3 October 1984 by reason of the words "FIC's has no objection" in the letter, is not an approval and the authority referred to in s. 5. It would appear from the FIC's letter that Bank Negara' is the sole and the only authority to grant the approval for the disposal of the shares. Bank Negara by its letter dated 8 November 1984 said this to the appellant:

> We write to inform you that the government has approved the exchange of shares of United Malayan Banking Corporation and Malaysian French Bank between Multi-Purpose Holdings Berhad on the one hand and Daan Sendirian Berhad and Dani Sendirian Berhad on the other, as outlined in your letter dated July 9, 1984.
>
> 2. ...
>
> 3. Additionally, the government has also approved the conditions attached to the agreement entered into between Multi-Purpose Holdings, Daan Sendirian Berhad and Dani Sendirian Berhad as follows:
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> (i) ...
>
> (ii) ...
>
> (iii) ...
>
> (iv) ...
>
> 4. ...
>
> (Emphasis added).

Thus, it is clear beyond doubt that by the contents of the above letter, Bank Negara Malaysia is the government authority referred to in s. 5. Indeed it is. Its approval must first be obtained before the disposal of the shares can be effected.

I, with respect, agree with the learned Special Commissioners' finding that 8 November 1984, the date of the Bank Negara's letter which conveyed the government approval of the conditions attached to the agreement, was the date of the government approval in the context of s. 5 of the STTA, and hence the date of the disposal of the shares. Since the government approval was obtained after the effective date 19 October 1984 of the STTA, the STTA as amended by the Act 323, was therefore correctly applied to the appellant's disposal of the said shares. In the circumstances, I hold that the Special Commissioners' decision in the case stated is therefore right in law, and I hereby affirm their deciding orders and dismiss the appeal with costs.

Reported by Eugene Ong